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Office of Administrative Law Judges
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Issue date: 08Feb2002

Case No: 2000-STA-0032

In the Matter of

MARK E. HOWICK,
Complainant,

v.

EXPERIENCE HENDRIX, L.L.C.,
Respondent,

ORDER DISMISSING CASE AND
APPROVING SETTLEMENT AGREEMENT

On October 31, 2001, this Court issued an order directing the parties to either submit a signed settlement agreement, as indicated at the formal hearing of the instant case, or show cause why this matter should not be rescheduled for hearing. On November 26, 2001, the respondent submitted a brief, maintaining that the case had been settled and dismissal was proper. On January 8, 2002, the complainant submitted a memorandum, contravening the respondent's position that the case had been settled. Specifically, the complainant, Mark Howick, opposed the enforcement of the settlement agreement reached between the parties at the conclusion of the formal hearing based upon a claim of duress. On January 15, 2002, the respondent replied to the complainant's memorandum.

After a review of the relevant evidence and legal authority, I find that there exists a valid settlement agreement, and the case should be DISMISSED.

The governing regulations clearly indicate that a case may be settled after the commencement of a formal hearing. 29 C.F.R. §1978.111(d)(2) states:

> At *any time* after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and such settlement is approved by the Administrative Review Board, United States Department of Labor, or the ALJ. A copy of the settlement shall

> be filed with the ALJ or the Administrative Review Board, United States Department of Labor as the case may be.

Id. (emphasis added).

Complainant alleges that no settlement agreement has been reached, but the facts do not comport with this assertion. The parties' actions at the close of the hearing explicitly demonstrate that a settlement was reached. It is well-settled law that a settlement need not be in writing to be effective. In *Tankersley v. Triple Crown Services, Inc*., 92- STA-8 (Sec'y Oct. 17, 1994), the Secretary approved a settlement based on the complainant's attorney's oral acceptance of a settlement offer. The Secretary determined that the complainant expressly authorized his attorney to settle the case, and when his attorney accepted Respondent's offer by telephone, a binding agreement existed. Complainant admitted that he instructed his attorney to "settle the claim for what you can get." The Secretary concluded that "[a]t most, Complainant appears to have had second thoughts about the level of his recovery, which does not justify setting aside an otherwise valid agreement." [citations omitted]

In *Eash v. Roadway Express, Inc.*, ARB No. 99-037, ALJ No. 1998-STA-28 (ARB Oct. 29, 1999), the ARB explained that where an oral agreement is presented for approval, the record clearly must reflect all material terms of the settlement and evidence an unequivocal declaration by the parties that they have agreed to those terms, such as evidence of documentation of an agreement signed by the complainant, *or by reaffirmance of an agreement by the complainant in open court*.

Eash and *Tankersley* control here. As the record reveals all material terms of the settlement and an unequivocal declaration by both parties of assent to the settlement in open court, I find that a valid settlement agreement clearly existed.

A settlement agreement is voidable on grounds of economic or other duress where a defendant has acted wrongfully to create and take advantage of an untenable situation. The plaintiff must show that the duress was the result of the defendant's conduct, and not solely the result of the plaintiff's own necessities. *See Chouinard v. Chouinard*, 568 F.2d 430 (5th Cir. 1978); *McGavock v. Elbar, Inc*., 86-STA-5 (ALJ May 5, 1988).

The complainant has failed to demonstrate any actions of the respondent or respondent's counsel which placed the complainant under duress. Respondent and respondent's counsel obviously cannot control the amount of sleep achieved the night before the hearing by the complainant, nor can respondent or respondent's counsel affect Complainant's opinion of his own counsel's performance. Likewise, respondent and respondent's counsel have no way of controlling

Complainant's counsel's advice as to the efficacy of settlement. Complainant's inferences from his own counsel's offer to waive his fees if settlement was pursued can in no way be attributed to the respondent's counsel. These examples, advanced in Complainant's memorandum, are non sequitur to the validity of the agreement and the presence of duress.

The only action that the respondent's counsel affirmatively took that Complainant alleges placed him under duress was respondent's counsel's threat of sanctions for the actions of Complainant's counsel. This potential litigation, however, had no bearing on the complainant's decision to accept the settlement offer or the multitude of other alternatives available to the Complainant, such as continuing the hearing, with counsel or pro se; resuming settlement negotiations; or seeking to hire a new attorney. Whether or not Complainant's counsel would face ethical charges in the future had no bearing on the complainant. Although Complainant may have truly believed that his counsel's performance was weakened by the threat of future sanctions, the respondent's counsel cannot be held to account for the deficiencies of opposing counsel. To do so would eliminate the adversarial nature of our legal system. This court will not take that ill-advised leap.

Pursuant to 29 C.F.R. § 1978.111(d)(2), the administrative law judge should review the settlement, determine if it is fair, adequate and reasonable, and, if he so concludes, issue a final order of dismissal. *Thompson v. G & W Transportation Co., Inc*., 90- STA-25 (Sec'y Oct. 24, 1990). After a review of the settlement, I cannot locate any term that is unfair, inadequate, or unreasonable. Accordingly, I shall dismiss the case.

In Respondent's post-hearing submissions, counsel urges this court to impose sanctions upon Complainant for his failure to comply with the agreed-upon settlement. Specifically, Respondent asks the Court to forfeit any amount owed under the settlement agreement to Complainant because of his delay in compliance with the settlement agreement. However, I lack the authority to grant the requested sanctions, even if the alleged conduct could be verified. Monetary sanctions under the Federal Rules of Civil Procedure, Rule 11 are not available. Inasmuch as 29 C.F.R. Part 18 addresses conduct that is dilatory, unethical, unreasonable, and in bad faith, the situation addressed by Rule 11 is provided for or controlled. *Stack v. Preston Trucking Co.*, 89-STA-15 (Sec'y Apr. 18, 1990); *see also* 29 C.F.R. §18.36.[1]

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[1]I decline to address the conduct brought to this court's attention in the facsimile of February 4, 2002, from respondent's counsel, as the actions described in that submission, even if capable of substantial verification, are clearly outside this court's jurisdiction. The Office of Administrative Law Judges is in no way authorized to issue restraining orders. If these concerns are genuine, they should be taken to the appropriate forum.

Pursuant to 29 C.F.R. § 1978.111(d)(2), an administrative law judge has the authority to approve an adjudicatory settlement. If approved, the administrative law judge's order is the final departmental action. *Fisher v. ABC Trailer Sales & Rental, Inc.*, 97-STA-20 (ARB May 29, 1998). An Order approving a settlement agreement in a STAA case should specify whether the dismissal of the complaint is with or without prejudice. *See Ratliff v. Airco Gases*, 93-STA-5 (Sec'y June 25, 1993). Where a case is dismissed because of a settlement, dismissal "with prejudice" is inappropriate unless agreed to by the parties. *See Thompson v. United States Dept. of Labor*, 885 F.2d 551 (9th Cir. 1989). *Thompson v. G & W Transportation Co., Inc.*, 90-STA-25 (Sec'y Oct. 24, 1990).

As both the proposed settlement agreement and the oral agreement memorialized by the transcript demonstrate that the parties intend for the settlement to dismiss the case "with prejudice," I approve the settlement agreement and dismiss the instant case with prejudice.

A
JOSEPH E. KANE
Administrative Law Judge